No. 08-1011

In the Supreme Court of the United States

RODNEY REID, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court abused its discretion by preventing petitioner from cross-examining a cooperating witness about the mandatory minimum sentence associated with charges that were dismissed as a result of his cooperation, but otherwise allowing petitioner to elicit the witness's admission that his cooperation allowed him to avoid a potential sentence of life imprisonment plus 20 years.

2. Whether 18 U.S.C. 924(c) violates the Due Process Clause or the separation of powers.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A58-A65) is not published in the Federal Reporter but is reprinted in 300 Fed. Appx. 50.

JURISDICTION

The judgment of the court of appeals was entered on November 12, 2008. The petition for a writ of certiorari was filed on February 10, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of conspiracy to commit robbery of commercial establishments, in violation of 18 U.S.C. 1951(a); five counts of robbery of commercial establishments, in

violation of 18 U.S.C. 1951(a); and five counts of possessing a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A). He was sentenced to 150 months of imprisonment on the robbery and conspiracy offenses, to be served consecutively to 107 years of imprisonment on the firearm offenses. Pet. App. A17-A18. The court of appeals affirmed. *Id.* at A58-A65.

1. Between October and December 2002, petitioner and several accomplices committed a series of armed robberies of commercial establishments in Queens and Nassau Counties, New York. Gov't C.A. Br. 3. During one of the robberies, petitioner entered the establishment carrying a firearm; during others, he acted as a getaway driver or lookout. *Id.* at 4-10.

The robbers used a white Mitsubishi that belonged to petitioner and was registered to the mother of his daughter. Gov't C.A. Br. 4. Police identified the car and traced it to a motel, where they found petitioner and two of his accomplices. *Id.* at 10. After a standoff lasting several hours, petitioner and the accomplices surrendered. *Id.* at 11. The police then discovered $10,780 in cash in the lining of petitioner's jacket. *Ibid.* In the motel room, they found evidence from the robbery of a check-cashing service, including moneygrams, an employee's handbag, ammunition, and firearms. *Id.* at 11-12. A search of the Mitsubishi led to the discovery of bandanas and other items from the robbery. *Ibid.*

2. A federal grand jury in the Eastern District of New York returned an indictment charging petitioner with conspiracy to commit robbery, in violation of 18 U.S.C. 1951(a), seven counts of robbery, in violation of 18 U.S.C. 1951(a), and seven counts of possessing a firearm in furtherance of a crime of violence, in violation

of 18 U.S.C. 924(c). Pet. C.A. App. A15-A23. The case was tried by a jury.

At trial, the government presented the testimony of the robbery victims, videotapes made by security cameras, and fingerprint and ballistics evidence. Gov't C.A. Br. 3. It also presented the testimony of three of petitioner's accomplices: Woodroe Smith, Dashawn Spratley, and Omar Jones. *Ibid.*

Smith testified to his involvement in the robberies. On direct examination, the prosecutor asked, "[W]hat happens if you lie now?" and Smith replied, "I could face anywhere up to life plus 20 in jail." Gov't C.A. App. 25. On cross-examination, Smith admitted that he had been involved in insurance fraud and dealing illegal drugs, *id.* at 30, and that he had confessed to participating in 13 armed robberies, *id.* at 28. He also admitted that he was given immunity from prosecution for those crimes in exchange for his cooperation, *id.* at 32, and that he believed he had received a "pretty good deal," *id.* at 34. And he acknowledged that his cooperation agreement called for him to plead guilty to the robbery conspiracy and to a drug conspiracy, but that he was not required to admit to any of the individual robberies or any of the firearms charges. *Ibid.* Defense counsel then asked for permission to "explore [Smith's] recollection on the 924(c) count and that as part of the deal he did not have to plead guilty to any mandatory firearms sentences." 7/18/06 Tr. 436. The court advised counsel not "to use this witness simply to parade before the jury the consequences of a 924 conviction." *Ibid.* Counsel thereafter reiterated that Smith had committed 13 armed robberies and had never pleaded guilty to a single firearms charge. Gov't C.A. App. 36-37.

Spratley's testimony was similar. On cross-examination, petitioner's co-counsel elicited testimony that his cooperation agreement insulated him from any gun charges. Gov't C.A. App. 50. Spratley acknowledged that "there's a federal charge that using and carrying a firearm in connection with a crime is a separate crime itself," and he admitted that the terms of his plea agreement did not require him to plead guilty to any firearm charges even though he had used a firearm during some of the robberies. *Ibid.*; see *id.* at 51. But the court did not permit him to testify about the mandatory minimum sentence under Section 924(c). *Id.* at 50.

In anticipation of the testimony of the third accomplice, Jones, petitioner's co-counsel stated his understanding that the court had ruled that "it's inappropriate to ask [accomplices] about the failure of the government to charge them with 924(c) violations." Pet. C.A. App. A121. The court responded, "I didn't say you couldn't cross-examine about the failure to charge 924(c). * * * Every accomplice has been cross-examined about that. I said I don't want before the jury the fact that there is a mandatory sentence that accompanies that." *Ibid.* On cross-examination, Jones acknowledged that he had pleaded guilty in state court and was testifying under a grant of immunity that did not require him to plead guilty to any firearms charges. Gov't C.A. App. 86-88.

The jury found petitioner guilty of conspiracy, five counts of robbery, and five counts of possessing a firearm in furtherance of a crime of violence. The jury found him not guilty of two of the robbery counts and two of the firearms counts. Gov't C.A. Br. 12-13.

3. Petitioner moved for a new trial, arguing, among other things, that the court's refusal to allow him to cross-examine the cooperating witnesses about the man-

datory minimum sentences associated with the gun charges they faced violated his rights under the Confrontation Clause of the Sixth Amendment. The district court denied the motion, stating that it had excluded the testimony under Federal Rule of Evidence 403 because "the probative value of this testimony [was] far outweighed by its prejudicial impact and tendency to confuse the jury." Pet. App. A31. "This was especially so," the court explained, "in view of the other cross-examination" that was permitted, which "afford[ed] more than ample information for the jurors to make a discriminating appraisal of the cooperating witness' motives for testifying falsely, including lengthy testimony concerning their extensive criminal histories, their prior inconsistent statements, the details of their cooperation agreements, and the Government's agreement to limit the charges against them." *Id.* at A32. The court emphasized that "the witnesses testified to their understanding that they faced a potential sentence of life imprisonment plus 20 years," and this "highly specific testimony" was "plainly sufficient to permit a jury to appreciate the strength of their incentive to provide testimony satisfactory to the prosecution." *Ibid.* And the court noted that the testimony petitioner sought was "marginally relevant at best" and would have "severely prejudiced the Government and confused the jury" by allowing the jury to take into account petitioner's possible sentence if he was convicted. *Id.* at A33.

The district court sentenced petitioner to 150 months of imprisonment on the conspiracy count and the robbery counts. Pet. App. A17. It also imposed a mandatory consecutive term of 107 years of imprisonment on the five firearms counts. *Ibid.*; see *Deal* v. *United States*, 508 U.S. 129 (1993).

4. The court of appeals affirmed. Pet. App. A58-A65. The court rejected petitioner's claim that the district court had improperly curtailed his cross-examination of the cooperating witnesses. *Id.* at A61-A62. The court of appeals held that the district court had not abused its discretion, because petitioner "already had elicited testimony from the cooperating witnesses reflecting their motivation to lie and their extensive criminal histories," and the district court "was understandably reluctant to expose the jury to potentially highly prejudicial information" about the sentence petitioner faced if convicted under Section 924(c). *Id.* at A62.

The court of appeals also rejected petitioner's assertion that Section 924(c) "vests excessive sentencing authority in the executive branch." Pet. App. A64. The court held that "the Constitution permits the exercise of prosecutorial discretion in charging section 924(c) violations absent use of 'an unjustifiable standard such as race, religion, or other arbitrary classification.'" *Id.* at A64-A65 (quoting *Oyler* v. *Boles*, 368 U.S. 448, 456 (1962)).

ARGUMENT

Petitioner asserts (Pet. 7-26) that the Confrontation Clause prohibits district courts from limiting a defendant's cross-examination of a cooperating witness about the mandatory minimum sentences he avoided as a result of his cooperation. The court of appeals correctly rejected that claim. Although there is some disagreement in the courts of appeals on the question presented, petitioner overstates the extent of those differences, and in any event this case is not a suitable vehicle for considering the issue. Petitioner also argues (Pet. 26-38) that the mandatory sentencing provision of 18 U.S.C. 924(c)

violates the Due Process Clause and the separation of powers. That claim lacks merit, and further review is not warranted.

1. a. The court of appeals correctly held that the district court did not abuse its discretion when it restricted petitioner's cross-examination of witnesses about the specific penalties associated with charges that they did not face, but that petitioner did face. "[E]xposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." *Delaware* v. *Van Arsdall*, 475 U.S. 673, 678-679 (1986). This Court has recognized, however, that "trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Id.* at 679.

In this case, the district court explained that it "determined to preclude [petitioner's] inquiry pursuant to the requirements of Federal Rule of Evidence 403 because [it] viewed the probative value of this testimony as far outweighed by its prejudicial impact and tendency to confuse the jury." Pet. App. A31. That ruling was a permissible exercise of the district court's discretion. Petitioner was permitted to cross-examine the witnesses about a variety of subjects—including all of their extensive criminal undertakings, their prior inconsistent statements, and their cooperation agreements with the government—and the jury therefore possessed sufficient information to make a discriminating appraisal of the witnesses' motives to testify falsely. *Id.* at A32. Petitioner cross-examined the cooperating witnesses about

the details of their cooperation agreements, and in fact, the agreements themselves were received in evidence. Gov't C.A. App. 116, 125. As the district court found, "[w]hether the witness[es] might have faced even higher hypothetical mandatory minimum sentences on uncharged firearms counts had they breached their cooperation agreements would not have added any significant new information for the jury's consideration." Pet. App. A32-A33.

In addition, the information that petitioner sought to elicit was highly prejudicial, because petitioner himself was charged with seven Section 924(c) counts. Permitting cross-examination about the mandatory sentences associated with those counts would have informed the jury of the sentences that would have followed if petitioner were convicted, thereby creating a significant risk of prejudice to the government. Pet. App. A33; see *Shannon* v. *United States*, 512 U.S. 573, 579 (1994) ("[P]roviding jurors sentencing information invites them to ponder matters that are not within their province, distracts them from their factfinding responsibilities, and creates a strong possibility of confusion."). The district court reasonably balanced that risk of prejudice against the limited probative value of the evidence in deciding to limit petitioner's questioning under Rule 403. Its fact-intensive exercise of discretion, which the court of appeals affirmed, does not warrant this Court's review.[1]

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[1] Petitioner argues (Pet. 14-19) that historical practice supports recognizing a right to inform the jury about the mandatory sentence that a cooperating witness avoids, but he offers no evidence of a right to cross-examine witnesses on that issue. Rather, he suggests that in the framing era, juries were aware of the penalties that defendants faced and sometimes returned verdicts that avoided especially harsh

b. Three courts of appeals have applied reasoning analogous to that applied by the court below to uphold restrictions on cross-examination of cooperating witnesses about mandatory sentences that they avoided. See *United States* v. *Luciano-Mosquera*, 63 F.3d 1142, 1153 (1st Cir. 1995), cert. denied, 517 U.S. 1234 (1996); *United States* v. *Cropp*, 127 F.3d 354, 360 (4th Cir. 1997), cert. denied, 522 U.S. 1098 (1998); *United States* v. *Nelson*, 39 F.3d 705, 708 (7th Cir. 1994). Petitioner contends (Pet. 8-14) that those decisions conflict with *United States* v. *Larson*, 495 F.3d 1094 (9th Cir. 2007) (en banc), cert. denied, 128 S. Ct. 1647 (2008), and *United States* v. *Chandler*, 326 F.3d 210 (3d Cir. 2003). While there is some tension in the circuits on whether a defendant has a confrontation right to cross-examine a cooperating witness on a mandatory minimum sentence that his cooperation may permit him to avoid, there is no conflict warranting this Court's review.

In *Larson*, the Ninth Circuit held that the defendants' Confrontation Clause rights were violated when they were not permitted to cross-examine a cooperating witness about the mandatory life sentence he faced in the absence of a substantial-assistance motion by the government. 495 F.3d at 1107 & n.14. At the same time, however, the court held that the error was harmless because counsel had an opportunity to "explore [the witness's] criminal past, history as a drug user and seller,

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penalties. But petitioner does not urge this Court to grant review on whether a defendant has a right to have the jury informed of the mandatory minimum sentence *he* faces (Pet. 25), so his historical evidence is irrelevant here. In any event, it is settled that evidence concerning the sentence that a defendant faces, when the jury lacks sentencing authority, may be excluded because it is confusing and distracting to the jury. *Shannon* v. *United States*, *supra*.

and desire to obtain a lesser sentence through his testimony against his co-conspirators." *Id.* at 1108. As the district court found, Pet. App. A32, those same considerations were present in this case. There is thus no reason to believe that, on these facts, the Ninth Circuit would reach a result different from that of the court below.

The decision in *Chandler* also does not squarely conflict with the unpublished decision in this case. In *Chandler*, the government limited the charges against one cooperating witness to those associated with a three-ounce sale of cocaine, despite evidence that he had engaged in the sale of five kilograms. 326 F.3d at 216-217. At trial, the witness testified that he was facing up to 18 months in prison for the three-ounce sale, but that he received only one month of house arrest. *Id.* at 217. On cross-examination, the district court barred Chandler's counsel from asking about the eight-year minimum Sentencing Guidelines sentence that the accomplice would have faced had he been charged with the full five kilograms. *Ibid.* While declining to decide whether a defendant has a categorical right to inquire into the "concrete terms" of a cooperating witness's agreement, *id.* at 221, the Third Circuit held that the district court's restriction on cross-examination had deprived the jury of a meaningful ability to assess the witness's credibility because it gave the jury "little reason to infer * * * that [the witness's] cooperation with the government might have meant the difference between more than eight years in prison, on the one hand, and the modest sentence he in fact received, on the other," *id.* at 222. As the district court noted here, however, this case is "easily distinguished" from *Chandler* because the jury was well aware of the magnitude of the reduction at issue, in that they knew that the witnesses "faced life plus 20

years" in the absence of their cooperation agreements. Pet. App. A32.[2]

c. Even if the question presented otherwise warranted review, this case would be a poor vehicle for considering it, for two reasons. First, petitioner raised no Sixth Amendment objection at trial to the court's ruling restricting his cross-examination. Although petitioner did refer to his Sixth Amendment rights in his new-trial motion and on appeal, he did not develop the constitutional argument he now presents in this court. It is well-settled that an objection to the admission or exclusion of evidence does not automatically preserve constitutional claims. See *California* v. *Green*, 399 U.S. 149, 156 (1970) ("[M]erely because evidence is admitted in violation of a long-established hearsay rule does not lead to the automatic conclusion that confrontation rights have been denied."); *United States* v. *Dukagjini*, 326 F.3d 45, 60 (2d Cir. 2003) ("We adhere to the principle that, as a general matter, a hearsay objection by itself does not automatically preserve a Confrontation Clause claim.") (collecting cases), cert. denied, 541 U.S. 1092 (2004). This Court does not ordinarily review questions not properly preserved below, and there is no reason to depart from that practice here.

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[2] Amicus Center on the Administration of Criminal Law relies (Br. 9) on *United States* v. *Cooks*, 52 F.3d 101 (1995), in which the Fifth Circuit held that the district court had erred in prohibiting questioning about the witness's "arrest for purse-snatching or [about] the stiff penalties [he] faced if convicted" on state drug charges. *Id.* at 103. That case is not relevant here because it did not involve a restriction on cross-examining a cooperating witness about a mandatory minimum sentence, and because the jury had no information concerning the serious penalties the cooperator faced.

Second, even if the district court's decision to restrict cross-examination was erroneous, the error was harmless beyond a reasonable doubt. As discussed above, the district court accorded petitioner ample latitude to explore the possible motives and biases of the government's cooperating witnesses, which resulted in the witnesses' having been thoroughly impeached. Cf. *United States* v. *Hoyte*, 51 F.3d 1239, 1243 (4th Cir.) (finding a lack of prejudice from the failure to disclose a witness's prior inconsistent statement, because the witness "was impeached in so many other ways"), cert. denied, 516 U.S. 935 (1995). Especially because the cooperating witnesses' testimony was corroborated by independent evidence establishing petitioners' guilt, any error was harmless.

2. Petitioner contends (Pet. 26-27) that prosecutorial charging decisions under statutes that require lengthy mandatory minimum sentences lead to "starkly different sentences for otherwise similarly situated defendants," in violation of the Due Process Clause, and impermissibly "unit[e]" the "power to prosecute and the power to sentence within the Executive Branch," in violation of the separation of powers. That claim lacks merit.

a. This Court has recognized that Congress's broad authority to determine the appropriate punishment for a federal crime includes the power to establish determinate sentences, see *Chapman* v. *United States*, 500 U.S. 453, 466-467 (1991), including a mandatory minimum sentence, *Harris* v. *United States*, 536 U.S. 545 (2002); *McMillan* v. *Pennsylvania*, 477 U.S. 79 (1986). The government also has broad charging discretion in deciding which offenses to prosecute, which it may constitutionally exercise unless it improperly relies on race, religion, ethnicity, or some other protected characteristic.

See, *e.g.*, *United States* v. *Armstrong*, 517 U.S. 456 (1996). A process by which Congress determines the appropriate punishment for violations of a criminal statute and the Executive enforces the statute in cases where the facts warrant it respects, rather than offends, the separation of powers.

Petitioner does not contend that the decision below conflicts with any decision of another court of appeals, and it does not. Instead, he suggests (Pet. 26-34) that the decision conflicts with *Mistretta* v. *United States*, 488 U.S. 361 (1989), and *United States* v. *Booker*, 543 U.S. 220 (2005). That is incorrect. *Mistretta* upheld the constitutionality of the Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 211, 98 Stat. 1987, and *Booker* held the Sentencing Guidelines unconstitutional insofar as they were mandatory and therefore permitted the maximum permissible punishment for an offense to be increased based on facts not found by a jury. Neither decision suggests that mandatory minimum sentences offend the Constitution, or that the Executive Branch transgresses the Constitution by deciding how many offenses to charge.

b. Citing a September 2003 memorandum issued by then-Attorney General John Ashcroft (Pet. 34-35), petitioner asserts that the government's charging decision in his case "violated the Department of Justice's own internal charging guidelines." Even if petitioner's reading of the memorandum were correct, an error by a government agency in interpreting its own internal guidelines would not establish a constitutional violation. *United States* v. *Caceres*, 440 U.S. 741, 752 (1979); see *United States* v. *Myers*, 692 F.2d 823, 846 (2d Cir. 1982), cert. denied, 461 U.S. 961 (1983). In any event, as the district court observed, petitioner's assertion rests on a

selective and incorrect reading of those policies. Pet. App. A35.

The memorandum in question begins by setting forth "the policy of the Department of Justice that, in all federal criminal cases, federal prosecutors must charge and pursue the most serious, readily provable offense or offenses that are supported by the facts of the case." Pet. App. A91. The memorandum acknowledges that there are "certain limited exceptions" to that "basic policy." *Ibid.* One such exception is that certain designated officials may "forego" the filing of a statutory enhancement, "but only in the context of a negotiated plea agreement, and subject to" the requirement that "[i]n all cases involving three or more readily provable violations of [Section] 924(c) in which the predicate offenses are crimes of violence, federal prosecutors shall, in all but exceptional cases, charge and pursue the first two such violations." *Id.* at A94-A95. Contrary to petitioner's selective reading of the memorandum, the government's charging decision in this case in no way contravened that policy. Petitioner's case did not involve a "negotiated plea agreement," and, in any event, the thrust of the policy is to *require* charging at least the first two readily provable Section 924(c) offenses, not to prohibit more, especially in "exceptional cases." *Id.* at A95.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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